did dismiss the appeal with costs. I also ordered payment out to the respondent of the sum paid into Court by way of security for costs of the appeal to account of its costs.

In consequence, I made the same orders in seven other related appeals being, numbered 59, 61 to 66 of 1982, raising identical questions of fact and law.

Appeal dismissed.

Solicitors: *Wong Hoong Yin & Co.; Annamalai & Co.*

MAHAT BIN ABDUL MAJID & ANOR. v. LAU KUI & ANOR.

[O.C.J. (Shankar J.) June 18, 1985]
[Johore Bahru – Civil Suit No. 256 of 1982]

Tort – Negligence – Collision between motor-cycle and motor-lorry – Motor-cyclist and pillion rider injured – Question of liability.

Damages – Fracture of radius, ulna and right femur – General damages at $34,000.

Damages – Fracture of acetabulum and ramus of pubic bone – General damages at $40,000.

The 1st plaintiff, Mahat, rider of a motor-cycle, met with an accident at 23½ milestone, Air Hitam/Johore Bahru road, on August 12, 1981. The 2nd plaintiff (Zaleha) was his pillion rider and wife-to-be. He left Muar for Johore Bahru for his wedding which was to take place that evening. A collision took place between the motor-cycle and the motor-lorry driven by the 1st defendant (lorry driver) at about 2.25 pm when the weather was good and the road dry. Coming from Air Hitam and proceeding in the direction in which Mahat was travelling, the 1st defendant had to negotiate a very sharp left-hand bend just before the place where the impact occurred. Coming from Johore Bahru and going in the direction in which the lorry driver was travelling, Mahat had to negotiate a left-hand bend after which the road was straight for some 3½ to 4 chains to the place where the impact occurred. The damage to the lorry was concentrated entirely on its off-side rear wheel. The entire damage to the motor-cycle was concentrated on its front in the vicinity of the wheel which had come adrift. Mahat said after he had negotiated the bend he saw the lorry encroach onto his path. Zaleha's evidence on liability is substantially similar to Mahat's. The lorry driver said he had taken a slight left-hand bend and was approaching the scene of accident when he saw the motor-cycle negotiating the bend ahead. After the motor-cycle went past, the lorry driver heard a bang from the rear.

Mahat sustained fracture of the mid-shaft of the right radius and ulna and the right femur. Compression plating of the right radius and ulna was done on August 24, 1981 and intramedullary mailing of the right femur was done on September 2, 1981. Thereafter his right knee was stiff and his right elbow was limited in supination. He had scars on his forearm and thigh and on the right gluteal region. There was some limitation of movements in the right hip. He had an abnormal extension of 10 degrees in the right knee and a limitation flexion also which would prevent him from squatting and sitting cross-legged. He was a piling operator and his injuries were such that he would not be able to return to his job as a piling machine operator.

Zaleha sustained a fracture of the left acetabulum and superior ramus of the right pubic bone and abrasions and lacerations. As a result of her injuries, she cannot move her hips, knees and feet with normal facility, walking is barely possible and is at a slow rate. She walks with a limp and is liable to lose balance easily. In her case also, the only dispute was her claim for earning capacity because she could not function comfortably in her occupation as a telephone operator.

Held, dismissing the action with costs: (1) the accident was caused entirely by the negligence of Mahat;

(2) in the event that the defendant were liable, damages would be assessed as follows:

In respect of Mahat

(a) special damages agreed at $4,500;

(b) general damages agreed at $34,000;

(c) $700 p.m. for the period of total incapability;

(d) future loss assessed at 17 years and 2 months at $100 p.m. on the actuarial tables.

In respect of Zaleha

(a) special damages agreed at $600;

(b) general damages for pain and suffering agreed at $40,000;

(c) claim for loss of earning capacity failed for lack of evidence.

Obiter dictum: "The time may soon come for us to consider whether in the light of modern circumstances the cause of action vested in a married woman to sue for damages which her husband has caused her does not constitute a part of her separate property."

Cases referred to:

(1) *Tara Singh* v. *The Public Prosecutor* [1954] M.L.J. 123.

(2) *K.R. Taxi Service Ltd. & Anor.* v. *Zaharah & Ors.* [1969] 1 M.L.J. 49.

(3) *Brophy* v. *Shaw London Times* dated June 25, 1965.

(4) *Curtis* v. *Wilcox* [1948] 2 K.B. 474, 479.

(5) *Drinkwater & Anor.* v. *Kimber* [1952] 1 All E.R. 701.

CIVIL SUIT.

N. Jegatheeson for the plaintiffs.
M. Varughese for the defendants.

Cur. Adv. Vult

Shankar J.: This is a claim for damages in a running down action. On August 12, 1981, Mahat bin Abdul Majid (Mahat) met with an accident at the 23½ milestone Air Hitam/Johor Bahru road. He was riding his motor-cycle AV5868C (the motor-cycle). He had left Muar earlier and was proceeding to Johor Bahru for his wedding which was to take place that evening. Riding with him as his pillion was his wife-to-be Zaleha bte. Atan (Zaleha). A collision took place between the motorcycle and the motor-lorry No. JJ 1033 (the motorlorry) driven by the 1st Defendant (the lorry driver). The collision took place at about 2.25 p.m. The weather was good and the road was dry.

From a photograph (Exhibit P2) of the scene taken about a year after the accident but which everybody agreed clearly depicts the scene, it is observed that coming from Air Hitam and proceeding in the direction in which Mahat was travelling, he had to negotiate a very sharp left-hand bend just before the place where the impact occurred. The road at that point according to the sketch plan is 24 feet wide. There was a double white line dividing the road into two equal halves. But on Mahat's side there was a clear gravel verge about eight feet in width. The left-hand bend which Mahat negotiated, in colloquial terms, could be described as a near blind corner.

Coming from Johor Bahru and going in the direction in which the lorry driver was travelling, he had to negotiate a left-hand bend after which the road was straight for an estimated 3½ to 4 chains to the place where the impact occurred. This information is clearly available from the photograph Exhibit P.2 and the evidence of the Investigating Officer. It should be noted that the sketch plan which he drew, which is not to scale, is a little misleading in this respect since the straightness of the road on the Johor Bahru side of the place of impact has not yet been clearly set out. But otherwise, the relevant aspects of the Investigating Officer's evidence are as follows. Proceeding from Johor Bahru towards Air Hitam he has marked the point which he believes to be the place of impact as M and this is very close to the double white line but on the lorry driver's correct side of the road. A little distance further on and on its correct side of the road about three feet from the centre was the motor-cycle. It was lying on its side. The force of its impact had dislodged the front wheel. 69 feet beyond and on Mahat's side of the road was the lorry. It had spun round on its own axis and was facing the direction from which it had come.

Especially relevant, the damage to the lorry was concentrated entirely on its off-side rear wheel. The tyre had punctured, the rim was bent and the axle of the lorry had come adrift from the housing which the I.O. referred to as the gear box. The spring of the off-side rear wheel was also broken. Otherwise the lorry was undamaged.

As for the motor-cycle the entire damage was concentrated on its front in the vicinity of the wheel which had come adrift. This Investigating Officer must have been a person of some considerable experience as he retired not long after the accident. Looking at the damage to the vehicles and relying upon his experience as an Investigating Officer, I find as a fact that the place where the impact occurred between the motor-cycle and the lorry was at M. It could have been caused either by the fork or some part of the motor-cycle coming into contact with the road or alternatively by the force of the sudden collapse of the off-side wheel of the lorry on the road surface. It is self-evident that this collision occurred whilst both vehicles were in motion. It is also self-evident that the impact was one of considerable force in order to produce the kind of damage which I have just described.

It is commonplace for road users to claim that they are always in the right and this case is no different. Mahat's version is that he was travelling in a normal manner on his correct side of the road. After he had negotiated the bend he saw the lorry ahead. It had encroached onto his path. When he first saw it, it was about 60-70 feet in front but well on his side of the road. Mahat says he immediately swerved to the left. He noticed the lorry driver also attempting to swerve to his left. He could not avoid the collision which took place. He claims that the point of impact was about three to four feet from the central white line but on his side of the road. He marked the place where he claims the accident occurred as being abreast of the point M on the plan. In cross-examination, he admitted that at the time of the accident he was going at about 90 k.p.h. as stated in his police report which he made the day after the accident whilst in hospital. He did not say in the report as he claimed in Court that he had reduced his speed to about 60 k.p.h. as he approached the corner. But he does ad-

mit that the accident occurred after he had already taken the corner. It was put to him that he had taken the corner at a dangerous speed but he disagreed. It was also put to him that he should have kept to the left of the road but he says that he felt it safer to travel in the centre because there were small pebbles on the side of the road. Zaleha's evidence on liability is substantially similar to Mahat's. But she claimed that she first saw the lorry when it was about 30 feet away.

She denied that Mahat was travelling fast and claims to have kept a constant look-out over his shoulders to see what was coming from the front. The lorry driver's evidence is that he had taken a slight left-hand bend and was approaching the scene of the accident when he saw the motor-cycle negotiating the bend ahead. He cannot remember how far in front the motor-cycle was when he first saw it but he is sure that the motor-cyclist had taken the bend when the accident happened. He insists that his lorry was on the correct side and he said that when he saw the motor-cycle approaching it was coming very fast. The motor-cycle was on its correct side of the road and it did not occur to the lorry driver that an accident was about to take place. So he proceeded as usual and both vehicles passed each other safely to start with. But after the motor-cycle went past the lorry driver heard a bang from the rear. His lorry lost control and spun round towards the direction of Johore Bahru and stopped. The force of the impact punctured his tyre and the long shaft which turns the gear box also came off. He denied that he was going fast. But he admits that the accident took place on the centre white line. He denies that he ever encroached onto the plaintiff's path.

Viewing the conflicting testimony against the backdrop of the independent evidence, I have no hesitation in coming to a finding that this accident took place as the lorry driver has described it. It is supported by the I.O.'s finding of the marks on the road at M. With a straight road ahead of him before he got to the point of impact, there was no reason for the lorry driver to have encroached on to the wrong side of the road. The more so as ahead of him was a very sharp right-hand bend. Additional supportive evidence is the damage to the lorry and its final resting place. I hold that the force of the collision between the front wheel of the motor-cycle and the rear off-side wheel of the lorry was of such great force that it was sufficient to pivot the lorry around the rear off-side wheel.

The problem with Mahat's version is that it cannot be reconciled with the independent evidence. I find it as a fact that he must have been travelling much too fast. To have swivelled a lorry around its rear off-side wheel, and caused the kind of damage to it which has just been described can lead to only that one conclusion. Even Mr. Mahat's counsel could not support Mahat's contention that the point of impact was at the place where Mahat put it. The reason I would give for this is that had the impact occurred there, not only would the scratch marks on the road have been found at that point, but also one would have expected the lorry to have spun round on the wrong side of the road and ended up more probably on the lorry driver's right. Furthermore the route which the lorry would have taken would not have permitted Mahat's motor-cycle to have come to rest at the place where it was found with only the area of the front wheel damaged and the rest of the motorcycle intact. Mahat's description of the accident is also improbable. If both vehicles were away from each other in the way he described with a gap of 60 feet between them they would have passed each other safely. Not to have seen the lorry further away than 60 feet is also indicative not only of the failure to keep a proper look-out but also evidence of speed. Bearing in mind that 30 m.p.h. is the equivalent of 44 feet per second, and 90 k.p.h. is the equivalent of 56.25 m.p.h. it seems to me a reasonable finding that Mahat took this corner at a speed which not only did not allow him sufficient control of his motor-cycle to prevent him drifting into and over the double white line but also did not allow himself enough time to see and cope with the traffic coming from the opposite direction.

Nor can Zaleha's evidence assist him much. If she saw the lorry for the first time when it was only about 30 feet away one cannot place too much store by her evidence.

Based on these conclusions, I regret that I am compelled to hold that this accident was caused entirely by the negligence by Mahat. Apart from all the other points which I have mentioned it is not possible for this Court to overlook the fact that Mahat had a berth of a full twelve feet on his side of the metal road in which to travel with an eight foot gravel verge added to it. Properly handled, this is a lot of room for a motor-cycle to manoeuvre safely but by choosing to travel at speed near the crown of the road I hold that Mahat was the author of this misfortune.

Both he and Zaleha suffered serious injuries as a result of this collision. Their wedding day was undoubtedly blighted and the residual effects of their injury will remain with them for the rest of their lives.

The natural sympathy that I have felt for them has led me to ponder very deeply whether there is any ground at all for holding that the lorry driver was contributorily negligent in some degree, however slight, for this accident. Could it not be said, for example, that had he been more alert and swerved further away to his own side in time, this accident could have been avoided? After all, although it is evident that he did not anticipate that there would be a collision when he saw the motor-cycle approaching him, the fact is that the accident did occur. Should one in the circumstances say, *res ipsa loquitur*, as it were, and fix him with some proportionate liability so that the plaintiffs may get some compensation for their injuries?

This predicament is reminiscent of a passage in Mr. Justice Buhagiar's *Tara Singh* v. *Public Prosecutor*[1] which reads:

"As Kukerji, J. points out in *Smith* v. *Emperor*, the difficulty in dealing with a case of this nature is to keep out of one's mind the prejudice that inevitably creeps in by reason of the fact that an injury has been caused and the responsibility for the same ultimately rests with no one else but the accused; this prejudice is bound more or less to reflect on the question of culpability of the accused and give rise to false issues which tend to cloud judicial vision."

That was a criminal case and this is a civil one where the responsibility for monetary compensation rests not with the defendants but with their insurers. But, if anything, that fact may be an additional reason why we should not be swayed by sentiment in our application of pure legal principles in arriving at a just result.

The test in such cases is not that the defendant failed to anticipate the event which took place. Ong Hock Thye, F.J. said in *K.L. Taxi Service Ltd. & Anor.* v. *Zaharah & Ors.*[2] that:

"With respect it seems to me that unless we hold that the development of the common law of negligence has now reached that stage of imposing strict liability on a person not to injure his neighbour, however blamelessly, we cannot demand that all drivers of vehicles should be perfectionists."

That statement was backed with high judicial authority which spelt out with great clarity that the defendant's duty, like that of any other road user was not to be an insurer, but only to exercise reasonable care. That was Lord Justice Willmer in *Brophy* v. *Shaw*[3] and he said:

"It would be going too far to say that in the circumstances surrounding this accident the defendant should have observed the negligent and irresponsible action of these two men earlier than he did."

Having come round a left-hand bend, the lorry driver was within his right in travelling on his correct side close to the central double white line before he proceeded to negotiate the right hand bend ahead of him. When he first sighted the motorcyclist, the latter was at his correct side and although travelling very fast, he was not then doing anything which suggested that a collision was imminent. That the lorry driver's judgment on this point cannot be faulted is proven by the fact that the motor-cyclist passed him quite safely. I therefore absolve him of any liability for this accident.

There were other interesting points of law which arose in this case which I do not have to decide. Mr. Jega urged me to find that this accident was caused substantially by the negligence of the lorry driver. He then added that even if I were disposed to find Mahat liable for contributory negligence, I had the power under section 10(2) of the Civil Law Act to exempt him from liability to make contribution. It was pointed out to me that since the defendant had filed a counterclaim against Mahat for a contribution or an indemnity against any damages which the defendants may be called upon to pay Zaleha, the consequence of omitting to exempt Mahat from liability to make contribution would possibly be a deprivation of any compensation which would otherwise be payable to him. No precedents have been cited to me of cases where such an exemption has been granted and if anything, I would have been indisposed to hold that it is the lorry driver, in this case, whose claim for exemption had far great merit.

Another point which I also do not have to decide is the capacity of Zaleha to sue Mahat for damages. *Curtis* v. *Wilcox*[4] and *Drinkwater & Anor.* v. *Kimber*[5] are both relevant authorities the extent to which a married woman can sue her husband for ante-nuptial torts. The time may soon come for us to consider whether in the light of modern circumstances the cause of action vested in a married woman to sue for damages which her husband has caused her does not constitute a part of her separate property.

In the event that my findings on liability are successfully challenged in a higher court it is proper that I should state my views on damages.

Mahat had fractures of the mid-shaft of the right radius and ulna and the right femur. Compression plating of the right radius and ulna was done on August 24, 1981 and intramedullary nailing of the right femur was done on September 2, 1981. Thereafter his right knee was stiff and his right elbow was limited in supination. He had scars on his forearm and thigh and on the right gluteal region. There were some limitation of movements in the right hip. He had an abnormal extension of 10 degrees in the right knee and a limitation of flexion also which would prevent him from squatting and sitting cross-legged. He was a piling operator and his injuries were such that he would not be able to return to his job as a piling machine operator. The parties agreed the special damages at $4,500 and his general damages at $34,000 but his loss of earnings were disputed. Mr. Jega claimed that since there was evidence to show that Mahat was earning $700 per month as a piling machine operator the Court should award him that sum for past loss of earnings on a basis of total incapacity for 18 months from August 12, 1981 until his discharge on March 11, 1983. From that day until the day of the trial which is 26 months he claimed for a partial loss of $300 per month. For future loss he claimed at the rate of $300 per month for 15 years. But the problem with his claim is that Mahat was not quite forthcoming about the sources of his income after this accident. He admitted that he could drive a car and was in fact maintaining one. He says that he goes walking about selling shirts now but does not do anything else. I agreed with Mr. Varughese that the plaintiff must mitigate his losses. The right figure for the period of his total incapacity, must be $700 per month but the partial loss cannot be $300 as claimed and I agree with Mr. Varughese that $100 per month would be generous. It would be more convenient to take this as a single head of future loss and I would give it what the actuarial tables yield for a period of 17 years and 2 months at $100 per month.

As for the 2nd plaintiff, Zaleha, the parties agreed her special damages at $600 and her general damages at $40,000 for pain and suffering alone. She had a fracture of the left acetabulum and superior ramus of the right pubic bone and abrasions and lacerations. The pleading and the medical report spelt out a whole host of problems which I do not need to set out here in detail. Suffice it to say, that as a result of her injuries, she cannot move her hips, knees and feet with normal facility, walking is barely possible and is at a slow rate. She walks with a limp and is liable to lose her balance easily. In her case also, the only dispute was her claim for earning capacity because she could not function comfortably in her occupation as a telephone operator. Since the accident she has ceased to do any night shifts. She has 10 years' service with the Telecoms, Singapore and is still employed there.

Unfortunately, there was absolutely no evidence whatsoever before the Court from her employers, or anyone else for that matter, that she would not continue to be gainfully employed in her present post. It was not suggested or proved that by not working on shift duties or at night, she had been deprived of an opportunity of earning overtime or other additional emoluments, which she would not otherwise have received. This part of the 2nd plaintiff's claim must therefore fail for lack of evidence.

The plaintiffs are both very presentable, well-mannered persons who have both very pleasing dispositions which made it additionally difficult for me to cope with the feeling that the result of my findings must be that they will leave this Court without anything to sweeten the pain which this accident had brought both of them. But the evidence led has not provided the legal basis required to make the finding in their favour and I must therefore dismiss this action with costs.

Claim dismissed.

Solicitors: *John & Jega; Varughese & Co.*

RE THIAN CHI SING (DEBTOR);

EX PARTE SCOTT & ENGLISH (MALAYSIA) SDN. BHD. (CREDITOR)

[A.C.J. (Tan Chiaw Thong J.) June 24, 1985]

[Miri – Bankruptcy No. KG. 33 of 1984]

Bankruptcy – Creditor's petition – Order for substituted service – Whether order should be drawn up – R.H.C. 1980, O.42 rr.9(2)(b)(iii) & 9(3)(d) and O.48 r.9 – Bankruptcy Rules, 1969, rr. 136 & 152.

Practice and Procedure – Bankruptcy – Creditor's Petition – Order for substituted service – Whether should be drawn up – R.H.C., 1980, O.42, r.9(2)(b)(iii) & r.9(3)(d), O.48 r.9 – Bankruptcy Rules 1969, rr. 136 & 152.

In relation to both substituted service of a bankruptcy notice or a creditor's petition where an order has been granted, an order should be drawn up.